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Agenda item 19

REPORT OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES ON ITS FORTY-FIRST SESSION

Note by the Chairman

I am circulating herewith a letter dated 12 January 1990, addressed to me by the Under-Secretary-General for Human Rights, attaching the Advisory Opinion delivered by the International Court of Justice on 15 December 1989 entitled "Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations".

Ref. No. G/SO 212/23 (45th)

12 January 1990

Dear Mr. Bossuyt,

As requested by the Secretary-General of the United Nations, Mr. Javier Pérez de Cuéllar, in a letter dated 22 December 1989, I have the honour to transmit herewith the Advisory Opinion delivered by the International Court of Justice on 15 December 1989 in pursuance of Economic and Social Council resolution 1989/75 regarding the applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations to the case of Mr. Dumitru Mazilu as a Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

Yours sincerely,

Jan Martenson
Under-Secretary-General
for Human Rights

Mr. Marc Bossuyt
Chairman of the Commission
on Human Rights
Regentschapsstraat, 61
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Belgium

1989

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

APPLICABILITY OF ARTICLE VI, SECTION 22, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

ADVISORY OPINION OF 15 DECEMBER 1989

READEX FICHE

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INTERNATIONAL COURT OF JUSTICE

YEAR 1989

15 December 1989

APPLICABILITY OF ARTICLE VI, SECTION 22, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

Competence of the Court to give opinion requested — Article 96, paragraph 2, of United Nations Charter — Relevance of lack of consent of State concerned — Opinion requested on applicability of multilateral convention — Dispute settlement clause providing for decisive advisory opinion — Reservation to clause — No reference to clause in request for opinion and no intention to invoke it — Request based exclusively on Article 96 of Charter — Jurisdiction to entertain the request not affected by reservation.

Propriety of giving the opinion — Whether there is any compelling reason to decline — Whether reply would have effect of circumventing principle of consent.

Convention on the Privileges and Immunities of the United Nations — Article VI, Section 22 — Meaning of "experts on missions" — Applicability of Section to all missions including those not requiring travel — Applicability to experts in States of which they are nationals or on territory of which they reside.

Status of special rapporteurs of United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities — Competence of United Nations to decide on retention of particular rapporteur.

ADVISORY OPINION

Present: *President* RUDA; *Judges* LACHS, ELIAS, ODA, AGO, SCHWEBEL, Sir Robert JENNINGS, BEDJAOUI, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN, PATHAK; *Registrar* VALENCIA-OSPINA.

Concerning the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The question upon which the advisory opinion of the Court has been requested is contained in resolution 1989/75 of the United Nations Economic and Social Council (hereinafter called "the Council"), adopted on 24 May 1989. By a letter dated 1 June 1989, addressed by the Secretary-General of the United Nations to the President of the Court, filed in the Registry on 13 June 1989, the Secretary-General formally communicated to the Court the decision by which the Council submitted to the Court for an advisory opinion the question set out in that resolution. The resolution, certified true copies of the English and French texts of which were enclosed with the letter, was in the following terms:

> "*The Economic and Social Council,*
>
> *Having considered* resolution 1988/37 of 1 September 1988 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Commission on Human Rights resolution 1989/37 of 6 March 1989,
>
> 1. *Concludes* that a difference has arisen between the United Nations and the Government of Romania as to the applicability of the Convention on the Privileges and Immunities of the United Nations to Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities;
>
> 2. *Requests*, on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I) of 11 December 1946, an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission."

Also enclosed with the letter were details of the voting on the resolution and on an amendment to the draft thereof whereby the words "on a priority basis" were added in paragraph 2.

2. On 14 June 1989 the Registrar gave the notice of the request for an advisory opinion prescribed by Article 66, paragraph 1, of the Statute of the Court to all States entitled to appear before the Court.

3. By an Order dated 14 June 1989 the President of the Court decided that the United Nations and the States which are parties to the Convention on the Privileges and Immunities of the United Nations adopted by the United Nations General Assembly on 13 February 1946 (hereinafter called "the General Convention") were likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute of the Court. The President, having regard to that paragraph, and considering that in fixing time-limits for the proceedings, it was "necessary to bear in mind that the request for opinion was expressed to be made 'on a priority basis' ", fixed 31 July 1989 as the time-limit within which the Court would be prepared to receive written

statements on the question and 31 August 1989 as the time-limit for written comments on written statements. On 14 June 1989 the Registrar addressed the special and direct communication provided for in Article 66, paragraph 2, of the Statute to the United Nations and to these States.

4. Written statements were submitted, within the time-limit so fixed, by the Secretary-General of the United Nations, and by Canada, the Federal Republic of Germany, the Socialist Republic of Romania and the United States of America. Written comments were submitted, within the relevant time-limit, by the United States of America. These statements and comments were communicated by the Registrar to the States to which he had sent the special and direct communication and to the United Nations.

5. The Secretary-General transmitted to the Court, pursuant to Article 65, paragraph 2, of the Statute, a dossier of documents likely to throw light upon the question; these documents were received in the Registry in instalments from 2 August 1989 onwards.

6. The Court decided to hold hearings, opening on 4 October 1989, at which oral statements might be submitted to the Court by any State or organization which had been considered likely to be able to furnish information on the question before the Court.

7. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and comments submitted to the Court accessible to the public, with effect from the opening of the oral proceedings.

8. At public sittings held on 4 and 5 October 1989, oral statements were made before the Court by Mr. Carl-August Fleischhauer, the United Nations Legal Counsel, on behalf of the Secretary-General, and by Mr. Abraham Sofaer, Legal Adviser, Department of State, on behalf of the United States of America. None of the other States which had presented written statements expressed a desire to be heard. Questions were put by Members of the Court to the representative of the Secretary-General, and answered before the close of the oral proceedings.

* *

9. Pursuant to Articles 55 *(c)* and 68 of the Charter of the United Nations, the Council, by resolution 5 (I) of 16 February 1946, supplemented on 18 February 1946, created a Commission on Human Rights (hereinafter called "the Commission"). In 1947 the Commission in its turn set up a Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter called "the Sub-Commission"), and in 1949 the Sub-Commission was given the following mandate:

> "*(a)* to undertake studies, particularly in the light of the Universal Declaration of Human Rights and to make recommendations to the Commission on Human Rights concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities; and

(b) to perform any other functions which may be entrusted to it by the Economic and Social Council or the Commission on Human Rights".

10. On 13 March 1984 the Commission, upon nomination by Romania, elected Mr. Dumitru Mazilu, a Romanian national, to serve as a member of the Sub-Commission for a three-year term, due to expire on 31 December 1986. Pursuant to the Commission's resolution 1985/13 calling upon the Sub-Commission to pay due attention to the role of youth in the field of human rights, the Sub-Commission at its thirty-eighth session adopted on 29 August 1985 resolution 1985/12 whereby it requested Mr. Mazilu to

> "prepare a report on human rights and youth analysing the efforts and measures for securing the implementation and enjoyment by youth of human rights, particularly, the right to life, education and work"

and requested the Secretary-General to provide him with all necessary assistance for the completion of his task. This report was to be submitted under an agenda item entitled "Promotion, protection and restoration of human rights at national, regional and international levels", at the thirty-ninth session of the Sub-Commission scheduled for 1986.

11. The thirty-ninth session of the Sub-Commission, at which Mr. Mazilu's report was to be presented, was not convened in 1986 but was rescheduled for 1987. The three-year mandate of its members — originally due to expire on 31 December 1986 — was extended by Council decision 1987/102 for an additional year. When the thirty-ninth session of the Sub-Commission opened in Geneva on 10 August 1987 no report had been received from Mr. Mazilu, nor was he present. By a letter received by the United Nations Office at Geneva on 12 August 1987, the Permanent Mission of Romania to that Office informed it that Mr. Mazilu had suffered a heart attack and was still in hospital. In its written statement to the Court, Romania stated that Mr. Mazilu had fallen seriously ill in May 1987, and that at that time he had not yet begun to draw up the report entrusted to him. According to the written statement of the Secretary-General, a telegram was received in Geneva on 18 August 1987 signed "D. Mazilu" informing the Sub-Commission of his inability, due to heart illness, to attend the current session.

12. In these circumstances, the Sub-Commission adopted decision 1987/112 on 4 September 1987, whereby it deferred consideration of item 14 of its agenda — under which the report on human rights and youth was due to be discussed — to its fortieth session scheduled for 1988. Notwithstanding the scheduled expiration on 31 December 1987 of Mr. Mazilu's term as a member of the Sub-Commission, the latter included reference to a report to be submitted by him, identified by

name, under the agenda item "Prevention of discrimination and protection of children", on the provisional agenda of its fortieth session, and entered the report under the title "Human rights and youth" in the "List of studies and reports under preparation by members of the Sub-Commission in accordance with the existing legislative authority".

13. After the thirty-ninth session of the Sub-Commission, the Centre for Human Rights of the United Nations Secretariat in Geneva made various attempts to contact Mr. Mazilu and to provide him with assistance in the preparation of his report, including arranging a visit to Geneva. Relevant information submitted by Governments, intergovernmental organizations and non-governmental organizations was sent to him on a regular basis. Having received from Mr. Mazilu two letters postmarked 25 and 29 December 1987, whereby he stated that he had not received the previous communications of the Centre, the Under-Secretary-General for Human Rights, in a telegram dated 19 January 1988 and addressed to the Acting Director of the United Nations Information Centre in Bucharest, requested the latter's assistance in facilitating Mr. Mazilu's work on his report by serving as a channel through which a ticket to Geneva would be provided to Mr. Mazilu; the Under-Secretary-General also asked that a formal invitation be communicated to Mr. Mazilu to come to the Centre for Human Rights for consultations.

14. In its written statement submitted to the Court, Romania stated that at Mr. Mazilu's request he had, from 1 December 1987, been put on the retired list as being unfit for service, and that in 1988 a medical commission, acting in accordance with current Romanian legislation, had re-examined Mr. Mazilu's state of health and decided to extend for a further one-year period his retirement on the grounds of continued unfitness for service. In a letter addressed to the Under-Secretary-General for Human Rights, handed on 15 January 1988 to the Acting Director of the United Nations Information Centre in Bucharest, Mr. Mazilu said that he had been twice in hospital, and that he had been forced to retire, as of 1 December 1987, from his various governmental posts. He stated that despite his willingness to come to Geneva for consultations, the Romanian authorities were refusing him a travel permit. In a series of letters dated 5 April, 19 April, 8 May and 17 May 1988, Mr. Mazilu further described his personal situation; in the first of these letters he alleged that he had refused to comply with a request addressed to him on 22 February 1988 by a special commission from the Romanian Ministry of Foreign Affairs voluntarily to decline to submit his report to the Sub-Commission. He consistently complained that strong pressure had been exerted on him and on his family.

15. On 31 December 1987 the terms of all members of the Sub-Commission, including Mr. Mazilu, expired (see paragraph 11 above).

On 29 February 1988 the Commission, upon nomination by their respective Governments, elected new members of the Sub-Commission, among whom was Mr. Ion Diaconu, a Romanian national. In response to a letter from the Permanent Representative of Romania to the United Nations Office at Geneva, dated 27 June 1988, referring to an offer by Mr. Diaconu to prepare a report on human rights and youth, the Under-Secretary-General for Human Rights recalled on 1 July 1988 that Mr. Mazilu had been mandated by the Sub-Commission resolution 1985/12 to prepare the report on that subject, and stated that only the Sub-Commission or a superior body was competent to change the designation; the Secretary-General had therefore to act pursuant to the instructions given by the Sub-Commission in the said resolution "to provide all necessary assistance to Mr. Dumitru Mazilu for the completion of this task".

16. Meanwhile, by a letter dated 6 May 1988 the Under-Secretary-General for Human Rights requested the assistance of the Permanent Representative of Romania to the United Nations Office at Geneva in transmitting to Mr. Mazilu all relevant information which had been submitted by Governments, specialized agencies and non-governmental organizations, and which was necessary for the completion of his report. By a letter of 15 June 1988, the Under-Secretary-General informed the Permanent Representative of Romania that, as an exceptional measure, he had decided to authorize a staff member of the Centre for Human Rights to travel to Bucharest for the purpose of working with Mr. Mazilu on his report, but only on the understanding that Mr. Mazilu would be enabled to present his report to the Sub-Commission in Geneva and to participate in the ensuing debate.

17. All the rapporteurs and special rapporteurs of the Sub-Commission were invited to attend its fortieth session (8 August to 2 September 1988) and the meetings of its working groups; however Mr. Mazilu again did not appear. Following a discussion at the 2nd meeting, held on 9 August 1988, a special invitation was cabled to Mr. Mazilu to go to Geneva to present his report, but the relevant telegrams were not delivered, and the United Nations Information Centre in Bucharest was unable to locate Mr. Mazilu. During the debate at the 9th meeting, held on 15 August 1988, on the organization of work of the session, various members expressed their views about Mr. Mazilu's situation, and the Chairman stressed the two-fold aim of the Sub-Commission, namely, to ensure that the study entrusted to Mr. Mazilu be brought to a satisfactory conclusion, and to try to ensure its presentation by Mr. Mazilu in person.

18. At its 10th meeting, held on 15 August 1988, the Sub-Commission adopted decision 1988/102, whereby it requested the Secretary-General

> "to establish contact with the Government of Romania and to bring to the Government's attention the Sub-Commission's urgent need to

establish personal contact with its Special Rapporteur Mr. Dumitru Mazilu and to convey the request that the Government assist in locating Mr. Mazilu and facilitate a visit to him by a member of the Sub-Commission and the secretariat to help him in the completion of his study on human rights and youth if he so wished".

The Under-Secretary-General for Human Rights informed the Sub-Commission at its 14th meeting, held on 17 August 1988, that in contacts between the Secretary-General's Office and the Chargé d'affaires of the Romanian Permanent Mission to the United Nations in New York, the possibility of establishing contact with Mr. Mazilu was raised.

19. The Under-Secretary-General reported that in these contacts the Chargé d'affaires had stated that any intervention by the United Nations Secretariat and any form of investigation in Bucharest would be considered interference in Romania's internal affairs; the case of Mr. Mazilu was an internal matter between a citizen and his own Government and for that reason no visit to Mr. Mazilu would be allowed.

20. At its 32nd meeting, held on 30 August 1988, the Sub-Commission considered a draft resolution contemplating that an advisory opinion on the applicability of the General Convention to the case of Mr. Mazilu be sought from the Court; it had before it an opinion by the Office of Legal Affairs of the United Nations Secretariat on that question, and a further opinion was obtained from that Office on the legal implications of the reservation made by Romania to Section 30 (the disputes-settlement provision) of the General Convention.

21. The Sub-Commission on 1 September 1988 adopted by 16 votes to 4, with 3 abstentions, resolution 1988/37. Taking into account that

"if Mr. Mazilu should be unable for whatever personal reasons to complete and present himself the said report to the Sub-Commission, he should be given any possible assistance by the United Nations enabling him to complete his report, with such assistance, in Romania",

the Sub-Commission, according to the terms of the operative part,

"1. *Requests* the Secretary-General to approach once more the Government of Romania and invoke the applicability of the Convention on the Privileges and Immunities of the United Nations, and request the Government to co-operate fully in the implementation of the present resolution by ensuring that Mr. Mazilu's report be completed and presented to the Sub-Commission at the

earliest possible date, either by himself or in the manner indicated above;

2. *Further requests* the Secretary-General, in the event the Government of Romania does not concur in the applicability of the provisions of the said Convention in the present case, and thus with the terms of the present resolution, to bring the difference between the United Nations and Romania immediately to the attention of the Commission on Human Rights at its forthcoming forty-fifth session in 1989;

3. *Requests* the Commission on Human Rights, in the latter event, to urge the Economic and Social Council to request, in accordance with General Assembly resolution 89 (I) of 11 December 1946, from the International Court of Justice an advisory opinion on the applicability of the relevant provisions of the Convention on the Privileges and Immunities of the United Nations to the present case and within the scope of the present resolution."

22. Pursuant to the foregoing resolution the Secretary-General on 26 October 1988 addressed a Note Verbale to the Permanent Representative of Romania to the United Nations in New York, in which he invoked the General Convention in respect of Mr. Mazilu and requested the Romanian Government to accord Mr. Mazilu the necessary facilities in order to enable him to complete his assigned task. As no reply had been received to that Note Verbale, the Under-Secretary-General for Human Rights on 19 December 1988 wrote a letter of reminder to the Permanent Representative of Romania to the United Nations Office at Geneva, in which he asked that the Romanian Government assist in arranging for Mr. Mazilu to visit Geneva so that he could discuss with the Centre for Human Rights the assistance it might give him in preparing his report.

23. On 6 January 1989 the Permanent Representative of Romania handed to the Legal Counsel of the United Nations an Aide-Mémoire in which was set forth the Romanian Government's position concerning Mr. Mazilu. On the facts of the case, Romania stated that Mr. Mazilu, who had not prepared or produced anything on the subject entrusted to him, had in 1987 become gravely ill with a serious heart condition and had had repeatedly to go into hospital over a period of several months. In November 1987, according to that Aide-Mémoire, he had "applied personally for disability retirement because of this condition, submitting appropriate medical certificates"; "in accordance with Romanian law, he was examined by a panel of doctors which decided to place him on the retired list on grounds of ill-health for an initial period of one year"; "at the end of the first year of his disability retirement, he was examined by a similar panel of doctors which decided to extend his retirement on grounds of ill-health".

24. On the law, Romania expressed the view in that Aide-Mémoire that "the problem of the application of the General Convention does not arise in this case": the Convention "does not equate rapporteurs, whose activities are only occasional, with experts on missions for the United Nations"; and

> "even if rapporteurs are given some of the status of experts, . . . they can enjoy only functional immunities and privileges, that is, privileges connected with their activities for the United Nations, during the period of their mission, and then only in the countries in which they perform the mission and in countries of transit".

For Romania, it was obvious that

> "an expert does not enjoy privileges and immunities in the country in which he has his permanent residence but only in the country in which he is on mission and during the period of his mission. Likewise, the privileges and immunities provided by the Convention begin to apply only at the moment when the expert leaves on a journey connected with the performance of his mission."

Moreover,

> "in the country of which he is a national and in countries other than the country to which he is sent on mission, an expert enjoys privileges and immunities only in respect of actual activities spoken or written which he performs in connection with his mission".

Romania stated expressly that it was opposed to a request for advisory opinion from the Court of any kind in this case. Similar contentions were also put forward in the written statement presented by Romania to the Court in the present proceedings.

25. At the forty-fifth session of the Commission in 1989, the Secretary-General presented a Note "pursuant to paragraph 2 of resolution 1988/37 of the Sub-Commission" (see paragraph 21 above), to which was attached his Note Verbale to the Romanian Government of 26 October 1988, and the Romanian Aide-Mémoire of 6 January 1989. The Commission adopted on 6 March 1989, by 26 votes to 5, with 12 abstentions, its resolution 1989/37 recommending that the Council request an advisory opinion from the Court. The Council on 24 May 1989 adopted by 24 votes to 8, with 19 abstentions, its resolution 1989/75 requesting an advisory opinion of the Court, as recommended in Commission resolution 1989/37, on the legal question of the applicability of Article VI, Section 22, of the General Convention in the case of Mr. Mazilu as Special Rapporteur of the Sub-Commission.

26. The Court has also been informed by the Secretary-General of the following events which have occurred since the request for advisory opinion was made. A report on human rights and youth prepared by Mr. Mazilu was circulated as a document of the Sub-Commission bearing the date 10 July 1989; the text of this report had been transmitted by Mr. Mazilu to the Centre for Human Rights in several instalments through various channels. At a meeting held on 8 August 1989, the Sub-Commission decided, in accordance with its practice, to invite Mr. Mazilu to participate in the meetings at which his report was to be considered: no reply was received to the invitation extended. By a Note Verbale dated 15 August 1989 from the Permanent Mission of Romania to the United Nations Office at Geneva addressed to that Office, the Permanent Mission referred to "the so-called report" by Mr. Mazilu, expressed surprise "that the medical opinions made available to the Centre for Human Rights ... have been ignored", and continued:

> "The fact that the Centre's administration has agreed, in these circumstances, to sponsor the publication of some of Mr. Mazilu's ideas and judgements under the auspices of the United Nations can only harm the standing and credibility of the Organization."

In the view of Romania,

> "Obviously since becoming ill in 1987, Mr. Dumitru Mazilu does not possess the intellectual capacity necessary for making an objective, responsible and unbiased analysis that could serve as the substance of a report consistent with the requirements of the United Nations."

At its 40th meeting held on 1 September 1989, the Sub-Commission adopted, by 12 votes to 4 with 2 abstentions, resolution 1989/45 entitled "The report on human rights and youth prepared by Mr. Dumitru Mazilu". The Sub-Commission noted that Mr. Mazilu's report had been prepared in difficult circumstances and that the relevant information collected by the Secretary-General appeared not to have been delivered to Mr. Mazilu. The Sub-Commission *inter alia* requested Mr. Mazilu to update his report and invited him to present it in person to the Sub-Commission at its next session; it also requested the Secretary-General to continue to gather and furnish to Mr. Mazilu information relating to his study, and to provide Mr. Mazilu with all the assistance he might need in updating his report, including consultations with the Centre for Human Rights.

•

27. The question laid before the Court by the Council is, in the terms of the resolution requesting the advisory opinion (resolution 1989/75, entitled "Status of Special Rapporteurs"),

> "the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations

> in the case of Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission [on the Prevention of Discrimination and the Protection of Minorities]".

According to the written statement submitted to the Court by the Secretary-General,

> "It should . . . be noted that while the Court has been asked about the applicability of Section 22 of the Convention in the case of Mr. Mazilu, it has not been asked about the consequences of that applicability, that is about what privileges and immunities Mr. Mazilu might enjoy as a result of his status and whether or not these had been violated."

During the oral proceedings, the representative of the Secretary-General, when replying to a question put by a Member of the Court, observed that:

> "it is suggestive of the Council's intention in adopting the resolution to note that, having referred to a 'difference', it then did not attempt to have that difference as a whole resolved by the question it addressed to the Court. Rather . . . the Council merely addressed a preliminary legal question to the Court, which appears designed to clarify at most the general status of Mr. Mazilu in respect of the Convention, without resolving the entire issue that evidently separates the United Nations and the Government."

* *

28. The present request for advisory opinion is the first request made by the Council, pursuant to paragraph 2 of Article 96 of the Charter. That paragraph provides that organs of the United Nations, other than the General Assembly and the Security Council,

> "which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities".

Such authorization in respect of the Council was given by General Assembly resolution 89 (I) of 11 December 1946. The question which is the subject of the request, involving as it does the interpretation of an international convention in order to determine its applicability, is a legal question. Furthermore it is one arising within the scope of the activities of the Council. As indicated in paragraph 10 above, Mr. Mazilu's assignment was pertinent to a function and programme of the Council. The Commission is a subsidiary organ of the Council, and the Sub-Commission, of which he was appointed special rapporteur, is in turn a subsidiary organ of the Commission. Accordingly, the request before the Court fulfils the conditions of Article 96, paragraph 2, of the Charter of the United Nations.

29. The Court has next to consider the contention of Romania, on the basis of the reservation made by it to Section 30 of the General Convention, that the Court "cannot find that it has jurisdiction to give an advisory opinion" in the present case. Section 30 of the General Convention provides:

> "All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

Romania acceded to the General Convention, and its instrument of accession was deposited with the Secretary-General on 5 July 1956. The instrument of accession contained the following reservation:

> "The Romanian People's Republic does not consider itself bound by the terms of section 30 of the Convention which provide for the compulsory jurisdiction of the International Court in differences arising out of the interpretation or application of the Convention; with respect to the competence of the International Court in such differences, the Romanian People's Republic takes the view that, for the purpose of the submission of any dispute whatsoever to the Court for a ruling, the consent of all the parties to the dispute is required in every individual case. This reservation is equally applicable to the provisions contained in the said section which stipulate that the advisory opinion of the International Court is to be accepted as decisive."

30. It is claimed by Romania that, because of the reservation made by it to Section 30, the United Nations cannot, without Romania's consent, submit a request for advisory opinion in respect of its difference with Romania. The reservation, it is said, subordinates the competence of the Court to "deal with any dispute that may have arisen between the United Nations and Romania, including a dispute within the framework of the advisory procedure," to the consent of the parties to the dispute. Romania points out that it did not agree that an opinion should be requested of the Court in the present case and concludes that the Court is without jurisdiction.

31. The jurisdiction of the Court under Article 96 of the Charter and Article 65 of the Statute, to give advisory opinions on legal questions, enables United Nations entities to seek guidance from the Court in order to conduct their activities in accordance with law. These opinions are advisory, not binding. As the opinions are intended for the guidance of

the United Nations, the consent of States is not a condition precedent to the competence of the Court to give them. As the Court observed in 1950,

> "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused." *(Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71.)

This reasoning is equally valid where it is suggested that a legal question is pending, not between two States, but between the United Nations and a member State.

32. Romania however relies on its reservation to Section 30 of the General Convention; but that Section operates on a different plane and in a different context from that of Article 96 of the Charter. When the provisions of the Section are read in their totality, it is clear that their object is to provide a dispute settlement mechanism. The first sentence of the Section provides for the case where a difference arises out of the interpretation or application of the General Convention between States parties to it, and contains two elements. The first is the treaty obligation to refer the difference to the Court, unless another mode of settlement is decided upon by the parties; the second is the object of the reference to the Court, namely to settle the difference.

33. The United Nations is itself intimately, and for the most part directly, concerned with the operation of the General Convention. Section 30 was therefore so framed as to take in also the settlement of differences between the United Nations and a State party to the General Convention. If such a difference arises,

> "a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties."

This provision pursues the same intent as expressed in the first sentence of Section 30; the particular nature of the proceeding contemplated is attributable to the status as an international organization of one of the parties to the difference.

34. In case of a request for an advisory opinion made under Section 30, the Court would of course have to consider any reservation which a party to the dispute had made to that Section. In the particular case of Romania, the Court would have to consider whether the effect of its reservation could be to act as a bar to the operation of the procedure of request for advisory opinion, or merely to deprive any opinion given of the decisive effect attributed to such opinions by Section 30. But in the present case, the resolution requesting the advisory opinion made no reference to Section 30, and it is evident from the dossier that, in view of the existence of the Romanian reservation, it was not the intention of the Council to invoke Section 30. The request is not made under that Section, and the Court does not therefore need to determine the effect of the Romanian reservation to that provision.

35. Romania however contends that although the Council resolution 1989/75 dated 24 May 1989 does not allude to Section 30 of the General Convention as the basis of its request for advisory opinion, the question which it raises nevertheless relates to the applicability of a substantive provision of the General Convention "to a concrete case considered to be a dispute between a State party to the Convention and the United Nations". It argues that

> "If it were accepted that a State party to the Convention, or the United Nations, might ask for disputes concerning the application or interpretation of the Convention to be brought before the Court on a basis other than the provisions of Section 30 of the Convention, that would disrupt the unity of the Convention, by separating the substantive provisions from those relating to dispute settlement, which would be tantamount to a modification of the content and extent of the obligations entered into by States when they consented to be bound by the Convention."

However, the nature and purpose of the present proceedings are, as explained above, that of a request for advice on the applicability of a part of the General Convention, and not the bringing of a dispute before the Court for determination. Furthermore, the "content and extent of the obligations entered into by States" — and, in particular, by Romania — "when they consented to be bound by the Convention" are not modified by the request and by the present advisory opinion.

36. The Court thus finds that the reservation made by Romania to Section 30 of the General Convention does not affect the Court's jurisdiction to entertain the present request.

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37. While, however, the absence of the consent of Romania to the present proceedings can have no effect on the jurisdiction of the Court, it is a matter to be considered when examining the propriety of the Court

giving an opinion. It is well settled in the Court's jurisprudence that when a request is made under Article 96 of the Charter by an organ of the United Nations or a specialized agency for an advisory opinion by way of guidance or enlightenment on a question of law, the Court should entertain the request and give its opinion unless there are "compelling reasons" to the contrary. In the *Western Sahara* case the Court adverted to a possible situation in which such a "compelling reason" might be present. In that case, commenting on its observations in the *Interpretation of Peace Treaties* case, to the effect that its competence to give an opinion does not depend on the consent of the interested States, the Court observed:

> "the Court recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion.
>
> 33. In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction." (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, paras. 32-33.)

38. In view of the emphasis placed by Romania on its reservation to Article 30 of the General Convention and the absence of its consent to the present request for advisory opinion, the Court must consider whether in this case "to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent". The Court considers that in the present case to give a reply would have no such effect. Certainly the Council, in its resolution requesting the opinion, did conclude that a difference had arisen between the United Nations and the Government of Romania as to the *applicability* of the Convention to Mr. Dumitru Mazilu. But this difference, and the question put to the Court in the light of it, are not to be confused with the dispute between the United Nations and Romania with respect to the *application* of the General Convention in the case of Mr. Mazilu.

39. In the present case, the Court thus does not find any compelling reason to refuse an advisory opinion. The Court will therefore proceed

now to reply to the legal question on which such an opinion has been requested.

* *

40. In order to determine the applicability of Article VI, Section 22, of the General Convention, to special rapporteurs of the Sub-Commission, and its applicability in the case of Mr. Dumitru Mazilu, the Court must first ascertain the meaning of that text.

41. According to Article 105, paragraph 1, of the Charter of the United Nations

> "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes."

Furthermore, according to Article 105, paragraph 2,

> "Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."

Lastly, Article 105, paragraph 3, states that the General Assembly "may propose conventions to the Members of the United Nations" with a view to determining the details of the application of paragraphs 1 and 2.

42. Acting in conformity with Article 105 of the Charter, the General Assembly approved the General Convention on 13 February 1946 and proposed it for accession by each Member of the United Nations. One hundred and twenty-four States, including Romania, are parties to the Convention.

43. As contemplated by Article 105 of the Charter, the General Convention determines the privileges and immunities enjoyed by the United Nations as such (Arts. II and III), lays down the privileges and immunities of the representatives of Members of the United Nations (Art. IV), and defines those of the officials of the Organization (Art. V). It contains in addition an Article VI entitled "Experts on Missions for the United Nations", divided into two Sections. Section 22 provides as follows:

> "Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:
>
> *(a)* immunity from personal arrest or detention and from seizure of their personal baggage;
>
> *(b)* in respect of words spoken or written and acts done by them in

the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(c) inviolability for all papers and documents;

(d) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys."

Section 23 adds:

"Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations."

Finally, Article VII, Section 26, of the General Convention grants certain facilities to experts when travelling on the business of the Organization.

44. The Court will examine the applicability of Section 22 *ratione personae*, *ratione temporis* and *ratione loci*, that is to say it will consider first what is meant by "experts on missions" for the purposes of Section 22, and then the meaning to be attached to the expression "period of [the] missions", before considering the position of experts in their relations with the States of which they are nationals or on the territory of which they reside.

45. The General Convention gives no definition of "experts on missions". All it does is to clarify two points, one negative and the other positive. From Section 22 it is clear, first that the officials of the Organization, even if chosen in consideration of their technical expertise in a particular field, are not included in the category of experts within the meaning of that provision; and secondly that only experts performing missions for the United Nations are covered by Section 22. The Section does not, however, furnish any indication of the nature, duration or place of these missions.

46. Nor is there really any guidance in this respect to be found in the *travaux préparatoires* of the General Convention. The Convention was initially drafted and submitted to the General Assembly by the Preparatory

Commission set up at San Francisco in June 1945; that initial draft did not contain anything corresponding to the present Article VI. That article was added by the Sub-Commission on Privileges and Immunities established by the Sixth Committee to examine the draft, but the contemporary official records do not make it possible to ascertain the reasons for the addition.

47. The purpose of Section 22 is nevertheless evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization, and to guarantee them "such privileges and immunities as are necessary for the independent exercise of their functions". The experts thus appointed or elected may or may not be remunerated, may or may not have a contract, may be given a task requiring work over a lengthy period or a short time. The essence of the matter lies not in their administrative position but in the nature of their mission.

48. In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions — increasingly varied in nature — to persons not having the status of United Nations officials. Such persons have been entrusted with mediation, with preparing reports, preparing studies, conducting investigations or finding and establishing facts. They have participated in certain peacekeeping forces, technical assistance work, and a multitude of other activities. In addition, many committees, commissions or similar bodies whose members serve, not as representatives of States, but in a personal capacity, have been set up within the Organization; for example the International Law Commission, the Advisory Committee on Administrative and Budgetary Questions, the International Civil Service Commission, the Human Rights Committee established for the implementation of the International Covenant on Civil and Political Rights, and various other committees of the same nature, such as the Committee on the Elimination of Racial Discrimination or the Committee on the Elimination of All Forms of Discrimination Against Women. In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22.

49. According to that Section, experts enjoy the privileges and immunities therein provided for "during the period of their missions, including the time spent on journeys". The question thus arises whether experts are covered by Section 22 only during missions requiring travel or whether they are also covered when there is no such travel or apart from such travel. To answer this question, it is necessary to determine the meaning of the word *"mission"* in French and "mission" in English, the two languages in which the General Convention was adopted. Initially, in keeping with its Latin derivation, the word referred to a task entrusted to a person only if that person was sent somewhere to perform it. It implied a journey. The same connotation is apparent in the words, of the same derivation, "emis-

sary", "missionary" and "missive". The French word *"mission"*, and the English word "mission", have however long since acquired a broader meaning and nowadays embrace in general the tasks entrusted to a person, whether or not those tasks involve travel.

50. The Court considers that Section 22, in its reference to experts performing missions for the United Nations, uses the word "mission" in a general sense. While some experts have necessarily to travel in order to perform their tasks, others can perform them without having to travel. In either case, the intent of Section 22 is to ensure the independence of such experts in the interests of the Organization by according them the privileges and immunities necessary for the purpose. In some cases these privileges and immunities are designed to facilitate the travel of experts and their stay abroad, for instance those concerning seizure or searching of personal baggage. In other cases, however, they are of a far more general nature, particularly with respect to communications with the United Nations or the inviolability of papers and documents. Accordingly, Section 22 is applicable to every expert on mission, whether or not he travels.

51. The question whether experts on missions can invoke these privileges and immunities against the States of which they are nationals or on the territory of which they reside has also been raised. In this connection, the Court notes that Section 15 of the General Convention provides that the terms of Article IV, Sections 11, 12 and 13, relating to the representatives of Members "are not applicable as between a representative and the authorities of the State of which he is a national or of which he is or has been the representative". Article V, concerning officials of the Organization, and Article VI, concerning experts on missions for the United Nations, do not, however, contain any comparable rule. This difference of approach can readily be explained. The privileges and immunities of Articles V and VI are conferred with a view to ensuring the independence of international officials and experts in the interests of the Organization. This independence must be respected by all States including the State of nationality and the State of residence. Some States parties to the General Convention (Canada, the Lao People's Democratic Republic, Nepal, Thailand, Turkey and the United States of America) have indeed entered reservations to certain provisions of Article V, or of Article VI itself (Mexico and the United States of America), as regards their nationals or persons habitually resident on their territory. The very fact that it was felt necessary to make such reservations confirms the conclusion that, in the absence of such reservations, experts on missions enjoy the privileges and immunities provided for under the Convention in their relations with the States of which they are nationals or on the territory of which they reside.

52. To sum up, the Court takes the view that Section 22 of the General

Convention is applicable to persons (other than United Nations officials) to whom a mission has been entrusted by the Organization and who are therefore entitled to enjoy the privileges and immunities provided for in this Section with a view to the independent exercise of their functions. During the whole period of such missions, experts enjoy these functional privileges and immunities whether or not they travel. They may be invoked as against the State of nationality or of residence unless a reservation to Section 22 of the General Convention has been validly made by that State.

* *

53. In the light of the foregoing, the Court will now consider the situation of special rapporteurs of the Sub-Commission. This is a question which touches on the legal position of rapporteurs in general, a category of persons whom the United Nations and the specialized agencies find it necessary to engage for the implementation of increasingly varied functions, and is thus one of importance for the whole of the United Nations system.

54. The establishment in 1946 of the Commission, and the establishment in 1947 of the Sub-Commission and the definition in 1949 of its mandate, have been described in paragraph 9 above. On 28 March 1947, the Council decided that the Sub-Commission would be composed of 12 eminent persons, designated by name, subject to the consent of their respective national Governments. Subsequently the members of the Sub-Commission, at present 25 in number, were chosen by the Human Rights Commission under similar conditions, and the Council in resolution 1983/32 of 27 May 1983, expressly "recall[ed] . . . that members of the Sub-Commission are elected by the Commission on Human Rights as experts in their individual capacity", and concluded that their alternates should therefore be elected and should serve on the same basis. The members of the Sub-Commission, since their status is neither that of a representative of a member State nor that of a United Nations official, and since they perform independently for the United Nations functions contemplated in the remit of the Sub-Commission, must be regarded as experts on missions within the meaning of Section 22.

55. In accordance with the practice followed by many United Nations bodies, the Sub-Commission has from time to time appointed rapporteurs or special rapporteurs with the task of studying specified subjects. These rapporteurs or special rapporteurs are normally selected from among members of the Sub-Commission. However, over the past ten years, special rapporteurs have, on at least three occasions, been appointed from outside the Sub-Commission. Furthermore, in numerous cases, special rapporteurs appointed from among members of the Sub-Commission

have completed their reports only after their membership of the Sub-Commission had expired. In any event, rapporteurs or special rapporteurs are entrusted by the Sub-Commission with a research mission. Their functions are diverse, since they have to compile, analyse and check the existing documentation on the problem to be studied, prepare a report making appropriate recommendations, and present the report to the Sub-Commission. Since their status is neither that of a representative of a member State nor that of a United Nations official, and since they carry out such research independently for the United Nations, they must be regarded as experts on missions within the meaning of Section 22, even in the event that they are not, or are no longer, members of the Sub-Commission. Consequently they enjoy, in accordance with Section 22, the privileges and immunities necessary for the exercise of their functions, and in particular for the establishment of any contacts which may be useful for the preparation, the drafting and the presentation of their reports to the Sub-Commission.

* *

56. Having thus pronounced on the applicability of Section 22 to special rapporteurs of the Sub-Commission, the Court must now give its opinion on the question of the applicability of this provision in the case of Mr. Dumitru Mazilu.

57. As has been noted earlier (paragraph 10 above), Mr. Dumitru Mazilu was elected a member of the Sub-Commission on 13 March 1984. On 29 August 1985 the Sub-Commission requested him to prepare a report on human rights and youth. The mandate of Mr. Mazilu as a member of the Sub-Commission expired on 31 December 1987. On that date, the report requested on human rights and youth had not been submitted and Mr. Mazilu was retained as special rapporteur by decisions or resolutions of the Sub-Commission adopted on 4 September 1987, 15 August 1988 and 1 September 1988 (paragraphs 12, 18 and 21 above). The Sub-Commission subsequently received a report by Mr. Mazilu, which was published on 10 July 1989; and by its resolution 1989/45 of 1 September 1989 (paragraph 26 above), the Sub-Commission once again retained Mr. Mazilu as special rapporteur, and requested him to update his report in the light of, *inter alia*, the information collected for him by the Secretary-General. Thus from 13 March 1984 to 29 August 1985 Mr. Mazilu had the status of member of the Sub-Commission. From 29 August 1985 to 31 December 1987, he was both a member and a rapporteur of the Sub-Commission. Finally, although since the last-mentioned date he has no longer been a member of the Sub-Commission, he has remained one of its special rapporteurs. At no time during this period, therefore, has he ceased to have the status of an expert on mission within the meaning of Section 22, or ceased to be entitled to enjoy for the exercise of his functions the privileges and immunities provided for therein.

58. Doubt was nevertheless expressed by Romania whether Mr. Mazilu was capable of performing his task as special rapporteur. Romania emphasized that he had been taken seriously ill in May 1987, and had therefore been placed on the retired list pursuant to decisions taken by the competent medical practitioners, in accordance with the applicable Romanian legislation; according to the Romanian written statement, he was at that time still unable to carry out his mandate as special rapporteur. Mr. Mazilu himself informed the United Nations that the state of his health did not prevent him from preparing the report entrusted to him or from going for this purpose to the Centre for Human Rights in Geneva. When a report by Mr. Mazilu was circulated as a document of the Sub-Commission, Romania expressed the view that it was obvious that "since becoming ill in 1987, Mr. Dumitru Mazilu does not possess the intellectual capacity necessary" for the preparation of "a report consistent with the requirements of the United Nations" (paragraph 26 above).

59. It is not for the Court to pronounce on the state of Mr. Mazilu's health, or on its consequences on the work he has done or is to do for the Sub-Commission. It is sufficient for it to note, first that it was for the United Nations to decide whether in the circumstances it wished to retain Mr. Mazilu as special rapporteur, and secondly to take note that decisions to that effect have been taken by the Sub-Commission.

60. In these circumstances Mr. Mazilu continues to have the status of special rapporteur, and as a consequence must be regarded as an expert on mission within the meaning of Section 22 of the General Convention. That Section is accordingly applicable in the case of Mr. Mazilu.

* * *

61. For these reasons,

THE COURT,

Unanimously,

Is of the opinion that Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Mr. Dumitru Mazilu as a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fifteenth day of December, one thou-

sand nine hundred and eighty-nine, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) José María RUDA,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judges ODA, EVENSEN and SHAHABUDDEEN append separate opinions to the Advisory Opinion of the Court.

(Initialled) J.M.R.
(Initialled) E.V.O.

SEPARATE OPINION OF JUDGE ODA

1. I agree with the Court's Opinion that

> "Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations is applicable in the case of Mr. Dumitru Mazilu as a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities." (Para. 61.)

I wonder, however, whether the Court, by simply giving this answer, has adequately responded to what the Economic and Social Council had in mind when formulating resolution 1989/75, in which it requested the Court, "on a priority basis", to give an opinion

> "on the legal question of the applicability of Article VI, Section 22, of the Convention . . . *in the case* of Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission." (Emphasis added.)

To my mind, this question would have been framed more restrictively if all that was desired was an unelaborated "yes" or "no" answer. The way it was actually framed gave scope, I believe, to certain pronouncements on the modalities of the *application* of Section 22 of the Convention to the *case* of Mr. Mazilu.

* *

2. As is stated in the Preamble to its resolution, the Economic and Social Council made that request after

> "*[h]aving considered* resolution 1988/37 of 1 September 1988 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Commission on Human Rights resolution 1989/37 of 6 March 1989".

The background to the request for an advisory opinion made to the Court by the Council may be reconstructed in a slightly different manner from that adopted by the Court, as I consider that greater emphasis could have been laid upon some facts which are more directly relevant to the motives of the Council in submitting the request.

3. Mr. Mazilu, then a member of the Sub-Commission whose term was to expire on 31 December 1987, had been requested by the Sub-Commis-

sion to prepare a report on human rights and youth (resolution 1985/12 of 29 August 1985). Relevant information had been regularly despatched to him from the United Nations Centre for Human Rights in Geneva. However, when the 1987 session of the Sub-Commission opened in Geneva on 10 August 1987, Mr. Mazilu had not presented a report and was absent from the meeting. On 12 August 1987, the Sub-Commission was informed that the Secretariat had just received a letter from the Permanent Mission of Romania in Geneva, by which it had been informed that Mr. Mazilu had suffered a heart attack in June and had been told that, as he was still in hospital, he would not be able to travel to Geneva. A telegram bearing the name "D. Mazilu", received on 18 August 1987 by the Secretariat, likewise conveyed a message that he was unable to attend the current session due to heart illness. On 4 September 1987, the Sub-Commission decided to defer until the 1988 session its consideration of the agenda item under which the report to be submitted by Mr. Mazilu was to have been discussed.

4. Subsequently, the Under-Secretary-General for Human Rights in Geneva attempted, by means of a letter of 3 November and a cable of 17 December 1987, to contact Mr. Mazilu and provide him with assistance in the preparation of his report, including arrangements for him to travel to Geneva. The Centre received from Mr. Mazilu two letters postmarked 25 and 29 December 1987 in which he said that he had not received its previous communications, including the invitation to the 1987 session, and that he could not obtain permission from his Government to come to the session in Geneva. In neither of those letters did Mr. Mazilu make any reference to having suffered from an illness. The Under-Secretary-General for Human Rights tried, on 19 January 1988, to make contact with Mr. Mazilu through the United Nations Information Centre in Bucharest and sent a formal invitation asking Mr. Mazilu to come to the Centre in Geneva for consultations during the two-week period from 15 February 1988.

5. In an undated letter addressed to the Under-Secretary-General, that was handed to the Acting Director of the Information Centre in Bucharest on 15 January 1988 and received in Geneva on 1 February 1988, Mr. Mazilu stated that he had been isolated from contacts with the Centre for Human Rights in Geneva and "because of this impossible situation, [he had] suffered very much". He had twice been in hospital and had been forced to retire, as of 1 December 1987, from his post in the Ministry of Foreign Affairs. He went on to say that, despite his willingness to come to Geneva for consultations, the Romanian authorities had refused him a travel permit. He further stated that he was "ready to go to the Centre at 14 February this year". In a series of six letters dated 5 April, 19 April (two of this date), 8 May (two of this date) and 17 May 1988, Mr. Mazilu further described his personal situation: in the first he declared that he had refused to comply with a request addressed to him on 22 February 1988 by a special commission from the Ministry of Foreign Affairs and

asking him to cable the Under-Secretary-General to say that he would not be able to prepare his report and to suggest that the task be handed over to another expert. He consistently complained that various kinds of strong pressure had been exerted on him and his family.

6. By a letter of 6 May 1988, the Under-Secretary-General for Human Rights requested the assistance of the Permanent Representative of Romania in Geneva in transmitting to Mr. Mazilu all the relevant information that he needed for the completion of his report. On the same day, the Under-Secretary-General suggested to Mr. Mazilu that he should travel to Geneva for the period extending from 30 May to 10 June 1988. By a letter dated 15 June 1988, the Under-Secretary-General informed the Permanent Representative of Romania that he had decided, as an exceptional measure, to authorize a staff member of the Centre for Human Rights to travel to Bucharest for the purpose of working with Mr. Mazilu on the draft of his report, on the understanding that Mr. Mazilu would be enabled to travel to Geneva to present his report to the Sub-Commission and participate in the ensuing debate. In a letter of 27 June 1988 the Permanent Representative of Romania, without directly responding on that point, simply referred to an offer to prepare a report on human rights and youth which had been made on 29 March 1988 to the Chairman of the Sub-Commission by a new Romanian member of the Sub-Commission for the term starting 1988, and which his Mission had transmitted to the Centre on 8 April 1988. On 1 July 1988, the Under-Secretary-General re-stated to the Permanent Representative of Romania his previous decision, which would have entailed Mr. Mazilu's paying a short visit to Geneva.

7. Mr. Mazilu, who was no longer a member of the Sub-Commission but remained entrusted with the completion of a report on human rights and youth, was once again absent when the 1988 session of the Sub-Commission opened in Geneva on 8 August 1988. Further to a decision taken at its meeting on 9 August 1988 to discuss the organization of work, a special invitation was cabled to Mr. Mazilu to come to Geneva to present his report. The telegram was not delivered, and the United Nations Information Centre in Bucharest was unable to locate Mr. Mazilu. On 15 August 1988, the Sub-Commission adopted decision 1988/102, whereby it requested the United Nations Secretary-General to establish contact with the Government of Romania. On 17 August 1988, the Under-Secretary-General informed the Sub-Commission that in those contacts the Chargé d'affaires of the Permanent Mission of Romania in New York had stated that Mr. Mazilu had been ill and had retired from the Foreign Office, so that he had been unable to proceed with his study for the report. He also made it clear that any intervention by the United Nations Secretariat and any form of investigation in Bucharest would be seen by his Government as an intervention in Romania's internal affairs. Romania held the view that the case of Mr. Mazilu was an internal

matter between a citizen and his own Government, and for that reason no visit to Mr. Mazilu would be allowed.

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8. It was in these circumstances that, on 1 September 1988, the Sub-Commission adopted resolution 1988/37, in which it asked the Secretary-General to "invoke [to the Government of Romania] the applicability of the Convention" and requested that Government "to co-operate fully in the implementation of the ... resolution by ensuring that Mr. Mazilu's report be completed and presented to the Sub-Commission at the earliest possible date". The Sub-Commission further requested the Secretary-General — "in the event the Government of Romania does not concur in the applicability of the provisions of the said Convention in the present case" — "to bring the difference between the United Nations and Romania immediately to the attention of the Commission on Human Rights at its [1989] session". The Sub-Commission also requested the Commission on Human Rights, "in the latter event", "to urge the Economic and Social Council to request ... from the International Court of Justice an advisory opinion on the applicability of the relevant provisions of the Convention ... to [that] case".

9. Pursuant to this resolution of the Sub-Commission, the Secretary-General, on 26 October 1988, addressed a Note Verbale to the Permanent Representative of Romania in New York in which, referring to the legal opinion given by the United Nations Legal Counsel on 23 August 1988, he invoked the Convention on the Privileges and Immunities of the United Nations in respect of Mr. Mazilu and requested the Romanian Government to accord the necessary facilities to Mr. Mazilu in order to enable him to complete his assigned task. As no reply was received, the Under-Secretary-General for Human Rights then sent a letter of reminder on 19 December 1988 to the Permanent Representative of Romania in Geneva.

10. On 6 January 1989, the Permanent Representative of Romania in New York handed to the United Nations Legal Counsel an Aide-Mémoire in which the Romanian Government set forth its position. Romania stated that, because of his illness and retirement, Mr. Mazilu was unable to prepare the report and that the question of the application of the Convention would not arise in his case.

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11. On 6 March 1989, the Commission on Human Rights adopted resolution 1989/37 by which the Commission, "*[n]oting* that the Government of Romania does not concur in the applicability of the provisions of the Convention ... in the case of Mr. Mazilu", recommended a draft resolu-

tion to the Economic and Social Council for adoption. On 24 May 1989 that text became the Council's resolution 1989/75 (which is partly quoted in paragraph 1 above), without any substantive change other than the inclusion of the words "on a priority basis".

* *

12. It is clear from these three resolutions (of the Sub-Commission, the Commission and the Council) that the Sub-Commission on Prevention of Discrimination and Protection of Minorities considered that the Convention on the Privileges and Immunities of the United Nations was applicable in the case of Mr. Mazilu, that the Commission on Human Rights considered that Romania "[did] not concur in the applicability of the provisions of the Convention", and that the Economic and Social Council concluded that "a difference [had] arisen between the United Nations and the Government of Romania as to the applicability of the Convention ... to Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission". What, then, was the "difference [that had] arisen between the United Nations and ... Romania as to the applicability of the Convention ... to Mr. Dumitru Mazilu as Special Rapporteur"?

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13. Firstly, it should be asked whether or not a special rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities falls within the category of "Experts on Missions for the United Nations", within the meaning of Article VI, Section 22, of the Convention. The United Nations affirmed the positive view but Romania was of the view, as expressed in its Aide-Mémoire of 6 January 1989, that "the Convention does not provide for rapporteurs, whose activities are only occasional, to be treated as experts on mission for the United Nations". The Court has concluded that a person exercising that function does fall within the category of "experts on missions" (para. 55).

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14. Secondly, in order to reply to the question on the applicability of Section 22 of the Convention in the case of Mr. Mazilu as a special rapporteur of the Sub-Commission, the Court must determine whether or not Mr. Mazilu was a special rapporteur at the time of adoption of the Council's resolution asking the Court to give an opinion (i.e., 24 May 1989), and whether he still continues to have that status. In this connection, it would also have been relevant to ask whether his mission was considered to have been completed by the organ which had entrusted it to him. Apart from the description of the background to the request for an advisory opinion

and of the ensuing events (paras. 9-26), the Court's Opinion makes scarcely any reference to Romania's position on this aspect of the question, except by recording its allegation that Mr. Mazilu was incapable of "carry[ing] out his mandate as special rapporteur" (para. 58).

15. In its Aide-Mémoire of 6 January 1989, Romania stated that

> "In 1987, Mr. Mazilu became gravely ill with a serious heart ailment and was repeatedly hospitalized over a period of several months. In November 1987, as a result of this illness, he personally applied for disability pension and furnished the necessary medical certificates. In accordance with Romanian law, he was examined by a medical commission which decided that he should be pensioned off on grounds of ill health for an initial period of one year.
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> [Q]uite recently, at the end of his first year on a disability pension, he was subjected to a further examination by a similar medical commission, which decided to extend his retirement on grounds of ill health."

While it did not exactly say as much, the Government of Romania undoubtedly considered that Mr. Mazilu was no longer a special rapporteur towards the end of 1987. One may take it that its holding this position was confirmed by the transmission by the Permanent Mission of Romania, on 8 April 1988, of an offer by a newly elected member from Romania to undertake the preparation of the report (see para. 5, above). Romania's position was reiterated in its written statement presented to the Court on 24 July 1989, in which the Court was told that

> "During the month of May 1987 [Mr. Mazilu] fell seriously ill and, for that reason and at his request he was, from 1 December 1987, withdrawn from office as being unfit for service. In 1988, a medical commission, acting in accordance with current Romanian legislation, proceeded to re-examine Mr. Dumitru Mazilu's state of health and decided to extend his retirement for a further one-year period on the grounds of continued unfitness for service.
>
> . . . . . .
>
> At the time of his retirement he had not even begun to draw up the report in question." (Written statement of Romania, p. 7.)

16. The United Nations adopted a different position. On 1 July 1988, the Under-Secretary-General for Human Rights stated in a letter to the Permanent Representative of Romania (which referred to the offer of assistance made by the new Romanian member) that

> "Professor Mazilu's mandate comes from a decision by the Sub-Commission in its resolution 1985/12 [to prepare the report on the

subject] and it would be within the competence only of the Sub-Commission, or a higher policy-making body, to change that designation".

17. Here, the essential question examined by the Court was whether Mr. Mazilu, in spite of his desire to maintain his status as a special rapporteur of the Sub-Commission, had lost that status owing to a decision made by the Romanian Government — or, in other words, whether the Romanian Government could have deprived him of the status of a special rapporteur of the Sub-Commission for whatever reasons. I share the view of the Court that "Mr. Mazilu continues to have the status of special rapporteur" — a conclusion that it reaches at the very end of its Opinion, that is, in paragraph 60.

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18. Thirdly, while the Court has not been asked to give a general opinion on the range of privileges and immunities enjoyed by a special rapporteur of the Sub-Commission or an expert on a mission for the United Nations (or, in other words, to say what kind of privileges he is entitled to receive, and to specify when, where and whether he is entitled to judicial immunities before the courts or other immunities elsewhere, at home or abroad), the question put by the Economic and Social Council does imply some requirement of attention to the material consequences of Mr. Mazilu's entitlement to the benefit of Article VI, Section 22, of the Convention.

19. The Government of Romania adverted to these matters in its Aide-Mémoire of 6 January 1989, and its position therein may best be expressed by quoting from its written statement:

> "Even if rapporteurs are to some extent seen as having the status of experts of the United Nations, ... Section 22, of the Convention ... make[s] it clearly apparent that an expert is not accorded such privileges and immunities anywhere and everywhere, but only in the country to which he is sent on mission and during the time spent on the mission, and also in the countries through which he must transit when travelling to meet the requirements of the mission. In the same way, the privileges and immunities only come into existence from the expert's time of departure, when he travels to accomplish the mission. In so far as the expert's journey to carry out the mission for the United Nations has not begun, for reasons entirely unconnected with his activity as an expert, there is no legal basis upon which to lay claim to privileges and immunities under the Convention, regardless of whether he is in his country of residence or in another country, in a capacity other than that of an expert.
>
> In the country of which he is a citizen, in the country where he has his permanent residence, or in other countries where he may be for reasons unconnected with the mission in question, the expert is only accorded privileges and immunities in relation to the content of the

activity in which he engages during his mission (including his spoken and written communications)." (Written statement of Romania, p. 6.)

20. The United Nations clearly took another view, as can be seen from the Note Verbale of 26 October 1988 from the Secretary-General to the Permanent Representative of Romania, in which the Secretary-General maintained that under Section 22 of the Convention Mr. Mazilu should have been

> "enabled to establish personal contact with the Under-Secretary-General for Human Rights in order that the Centre for Human Rights might accord to Mr. Mazilu the assistance he require[d]".

In his written statement presented to the Court on 31 July 1989, the Secretary-General referred to his Note Verbale of 26 October 1988,

> "in which he invoked the General Convention in respect of Mr. Mazilu and requested the Romanian Government to accord Mr. Mazilu the necessary facilities, including travel to Geneva, in order to enable him to complete his assigned task" (written statement of the United Nations Secretary-General, para. 24).

21. The Advisory Opinion states, in general terms, that

> "the intent of Section 22 is to ensure the independence of such experts in the interests of the Organization by according them the privileges and immunities necessary for the purpose. In some cases these privileges and immunities are designed to facilitate the travel of experts and their stay abroad, for instance those concerning seizure or searching of personal baggage. In other cases, however, they are of a far more general nature, particularly with respect to communications with the United Nations or the inviolability of papers and documents. Accordingly, Section 22 is applicable to every expert on mission, whether or not he travels." (Para. 50.)
>
> "The privileges and immunities of Article . . . VI are conferred with a view to ensuring the independence of international officials and experts in the interests of the Organization. This independence must be respected by all States including the State of nationality and the State of residence." (Para. 51.)

Though correct, these pronouncements nevertheless do not seem to focus sufficiently upon the essential aspects of the concrete *case* of Mr. Mazilu, including the fact that he was unable to receive documentation from, enter into contact with, or be approached by the United Nations Centre for Human Rights in Geneva and was prevented by his Government from travelling to Geneva for consultations with the Centre or for the purpose of presenting a report to the Sub-Commission. Confirmation of Mr. Mazilu's possession of a general status conferring privileges and immunities does not, in my view, exhaust the Court's remit.

22. It may be contended that the Court has merely been asked to give its opinion "on the legal question of the *applicability* of Article VI, Section 22, of the Convention" (emphasis added), not to consider the matter of its *application*. I am conscious of the Secretary-General's written statement, referred to in the opinion of the Court, to the effect that:

> "the Court ... has not been asked about the consequences of [the] applicability [of Section 22 of the Convention], that is about what privileges and immunities Mr. Mazilu might enjoy as a result of his status and whether or not these had been violated" (written statement of the United Nations Secretary-General, para. 2),

and appreciate that the Legal Counsel, as the representative of the Secretary-General, stated during the oral proceedings that:

> "the [Economic and Social] Council merely addressed a preliminary legal question to the Court, which appears designed to clarify at most the general status of Mr. Mazilu in respect of the Convention without resolving the entire issue that evidently separates the United Nations and the Government".

While this may theoretically justify contenting oneself with a mere statement that Article VI, Section 22, is applicable to Mr. Mazilu as a special rapporteur falling within the category of "experts on missions for the United Nations", it is not, in my view, possible to determine the *applicability* of a provision to a concrete case without adequate reference to the way in which it may apply. In this respect, the Court simply states, in very general terms, that:

> "[rapporteurs and special rapporteurs] enjoy, in accordance with Section 22, the privileges and immunities necessary for the exercise of their functions, and in particular for the establishment of any contacts which may be useful for the preparation, the drafting and the presentation of their reports to the Sub-Commission" (para. 55).

23. In my view the Court should not have neglected to recount and deal explicitly with the way in which Mr. Mazilu, in Romania, was isolated from contacts with the United Nations Centre for Human Rights in Geneva and prevented from travelling to Geneva for the completion of the task entrusted to him by the United Nations, because these aspects are fundamental to the case of Mr. Mazilu which the Court has been requested to examine.

* *

24. In conclusion, I believe that, bearing in mind the necessity that the Court's "participation in the activities of the Organization" (*I.C.J. Reports 1950*, p. 71) should be as useful as possible, the final paragraph of the Opinion could have been slightly expanded, without trenching upon con-

tentious matters of fact. Instead of giving a bald affirmative answer, it should have stated more explicitly: firstly, that a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities falls within the category of "Experts on Missions for the United Nations"; secondly, that Mr. Mazilu was, at the time of the request for the opinion by the Economic and Social Council, a special rapporteur of the Sub-Commission and that he still exercises that function; and, finally, that Mr. Mazilu was, in the interest of the United Nations, entitled to receive from all parties to the Convention on the Privileges and Immunities of the United Nations, including his national State, all facilities within their power for the fulfilment of his mission. If the Court had made such a pronouncement, it would usefully have drawn attention to the necessity of allowing Mr. Mazilu unimpeded communication with and access to the United Nations Centre for Human Rights.

(Signed) Shigeru ODA.

SEPARATE OPINION OF JUDGE EVENSEN

I fully agree with the Advisory Opinion of the Court but have some additional views on one special aspect thereof. The Opinion states in paragraph 14 that "strong pressure had been exerted on him [Mr. Mazilu] and on his family".

Thus in his letter of 5 April 1988 to Mr. Martenson, United Nations Under-Secretary-General for Human Rights, Mr. Mazilu maintains that "unfortunately, a strong pressure on me and on my family continues in order to sign such a paper". The paper here referred to is a letter of resignation as rapporteur on the topic assigned to him on "Human rights and youth". In a letter of 19 April 1988 to the Chairman of the relevant United Nations Sub-Commission he also complains that his own Government "did everything possible to discourage me to prepare it [the report]".

As special incidents of such pressures Mr. Mazilu mentions in his letter of 8 May 1988 that: "Since 15 February 1988 more than twenty policemen are following me, my wife and my son day and night."

In his letters he mentions as additional concrete examples of such harassments that his "access to the UN Information centre in Bucharest was blocked" and his "telephone has been disconnected".

However, the sole question put to the Court in the request of ECOSOC is "the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities". Thus the Court has not been requested to express itself on concrete violations of these provisions. But it seems evident that the pressures exerted have caused concern and hardship not only to Mr. Mazilu but also to his family. It seems obvious that the protection provided for in Article VI, Section 22, of the 1946 Convention cannot be confined only to the "expert Mazilu" but must apply to a reasonable extent to his family. This seems self-evident and has been touched upon in one special relation in Article V, Section 18 *(d)*, of the Convention. It states that officials of the United Nations shall "be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration".

However, this provision is one concrete expression of a basic general principle. The integrity of a person's family and family life is a basic human right protected by prevailing principles of international law which derive not only from conventional international law or customary

international law but from "general principles of law recognized by civilized nations".

Thus in the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948 the integrity of family and family life was laid down as a basic human right in Article 16, paragraph 3, as follows: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." This principle, which is a concrete expression of an established principle of human rights in the modern law of nations, has been similarly expressed in other international law instruments. Thus the European Convention on Human Rights (the Rome Convention) of 4 November 1950 provides in Article 8, paragraph 1: "Everyone has the right to respect for his private and family life, his home and his correspondence."

The respect for a person's family and family life must be considered as integral parts of the "privileges and immunities" that are necessary for "the independent exercise of their functions" under Article VI, Section 22, of the 1946 Convention on the Privileges and Immunities of the United Nations.

(Signed) Jens EVENSEN.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

I have voted in favour of the Advisory Opinion but consider it necessary to explain my position on four aspects. These relate to: (i) the priority basis of the request; (ii) Romania's reservation to the Convention on the Privileges and Immunities of the United Nations, 1946; (iii) Romania's case relating to Mr. Mazilu's state of health; and (iv) the applicability of the Convention to enable an expert to leave his State of nationality or residence in connection with his mission.

I. The Priority Basis of the Request

The first aspect concerns the Order of Court of 14 June 1989, as referred to in paragraph 3 of the Advisory Opinion. As appears from the Order, "in fixing time-limits for the proceedings" it was found "necessary to bear in mind that the request for opinion was expressed to be made 'on a priority basis'" (*I.C.J. Reports 1989*, p. 10). The dossier shows that the introduction of those last four quoted words in the formulation of the request was the subject of specific challenge in the proceedings of ECOSOC on the ground "that the Council was not empowered to give the Court guidelines with regard to priorities when it did not know what other questions the Court had before it ..." (Dossier, doc. No. 98, p. 2, *per* Mr. Mikulka, Czechoslovakia, May 1989). I do not think that the challenge was well founded, but it does raise a point of sufficient importance to require me to say that, in my opinion, it is always for the Court, while giving due and proper weight to any representations by a requesting body, to decide in its own discretion whether the circumstances of any particular case justify a priority hearing. The question has been helpfully noticed by the commentators, but I would like to state an approach limited to the level of certain general principles.

As is suggested by the case of the *Trial of Pakistani Prisoners of War, Interim Protection* (*I.C.J. Reports 1973*, p. 330, paras. 10-14), the eligibility of a new case to be heard in priority to other pending cases presupposes urgency, and the Court remains competent to adjudicate on urgency even where a case formally falls within a category of priority prescribed by the Rules of Court. This, I apprehend, is because of the overriding judicial character of the Court as established by the Charter and the Statute, with

both of which the Rules of Court must of course conform in their provisions, as well as in their interpretation and operation.

As I read the *travaux préparatoires* relating to the establishment of the Permanent Court of International Justice, they show that, in contradistinction to the Permanent Court of Arbitration accommodated under the same roof, the former was intended to be a court of justice as normally understood. That key concept, though derived from municipal law, was intended to be generally controlling and, indeed, its primacy has been repeatedly affirmed both by that Court and by this. The chief characteristic of a court of justice is that it is invested with judicial power. In the normal case, some external agency possessed of appropriate legislative competence over the jurisdiction of a court, or, failing that (as in this case), the machinery competent to amend the constitution of the court, may well have authority to modify the extent of the court's original endowment of judicial power; but, however that may be, the court itself is powerless to alienate any part of its grant. Even when account is taken of the usual caution relating to the transposition of municipal law concepts to the plane of international law, it seems unpersuasive to appeal to the international status of an international court of justice to suggest that on so fundamental a matter such a court is exempt from the restraints applicable to courts of justice as generally understood.

A decision to hear a new case in priority to other pending cases has consequences both for the hearing of the new case and for that of the others, and hence for the good administration of justice. Such a decision pertains to, and forms part of, the Court's judicial power. Accordingly, the Court's rule-making competence would not embrace the transfer to a party or to an entity in an analogous position, of any part of the power of the Court to determine questions relating to priority (the right to submit any views being another matter). This would be so even in an advisory case, given the essential judicial character of the Court. True, in such cases "the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 71); but, of course, it is as a court of justice that the Court participates. The Court no doubt has autonomy in the exercise of its rule-making competence; but, however extensive its autonomy, its competence is not unbounded. A clear and definite limit is discovered by the reflection that, however generously it may be construed, the Court's rule-making competence was intended to be used for the purpose of regulating the exercise of the Court's judicial power, not for the purpose of disposing of it. The Rules of Court are made, and are intended to be read, on the basis of this understanding. The Court remains free, therefore, to determine the need for priority in all cases.

II. The Romanian Reservation to the General Convention

Paragraphs 29 to 36 of the Advisory Opinion deal with Romania's contention that the absence of its consent bars recourse to the advisory jurisdiction of the Court under Article 96 of the Charter. As the Advisory Opinion suggests, Romania logically can only be taking that position if it is also taking the position that its reservation to Section 30 of the General Convention is applicable to the Charter so as to impose a requirement for consent as a pre-condition to recourse to that jurisdiction. I agree with the Court in not accepting this contention but would like to give my reasons.

Aside from the question whether the Charter admits of reservations and apart from the difficulty presented by the notion of a reservation being made to a treaty (in this case, the Charter) by a State after it has become a party to the treaty, it seems to me that the idea of a reservation to one treaty operating also as a reservation to another treaty is essentially not right. In the *Nuclear Tests (Australia* v. *France)* case (*I.C.J. Reports 1974*, p. 253) the Court had before it a contention that certain reservations contained in a declaration by France accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute applied also to its obligations under the General Act for the Pacific Settlement of International Disputes, 1928. Referring to this contention and to Article 2, paragraph 1 *(d)*, of the Vienna Convention on the Law of Treaties, 1969, the joint minority opinion (Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock) observed:

> "in principle, a reservation relates exclusively to a State's expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations." (*Ibid.*, p. 350.)

The correctness of this statement of principle is scarcely open to challenge.

The effect of the Romanian reservation is on Section 30 of the Convention alone. By contrast, competence to request an advisory opinion is regulated exclusively by Article 96 of the Charter. Section 30 of the Convention does not and cannot confer a competence on anyone to request an advisory opinion; the Section is hinged on any such competence conferred by or under Article 96 of the Charter. All that Section 30 of the Convention does is to make it compulsory for the body vested with appropriate competence by or under Article 96 of the Charter to exercise that competence in relation to certain differences, and incumbent on the

parties to such differences to accept the resulting advisory opinion as "decisive". The action of the reservation is exerted on these two additional features and not on the Court's jurisdiction under Article 96 of the Charter. If, because of the reservation, these two features fall away in the case of Romania, the jurisdiction under Article 96 of the Charter remains, as before, unaffected by the reservation. And this, it should be added, is putting at its highest Romania's view of the extent to which the reservation affects Section 30 of the Convention — a view that is open to dispute but which I agree with the Court it is not necessary to examine (see paragraph 34 of the Advisory Opinion).

In sum then, while agreeing with paragraph 36 of the Advisory Opinion that "the reservation made by Romania to Section 30 of the General Convention does not affect the Court's jurisdiction to entertain the present request", I would like to add that the reservation does not affect that jurisdiction because it simply cannot.

III. Romania's Case Relating to Mr. Mazilu's State of Health

On the question of Mr. Mazilu's state of health, I agree with the finding made in paragraph 59 of the Advisory Opinion to the effect "that it was for the United Nations to decide whether in the circumstances it wished to retain Mr. Mazilu as special rapporteur . . ."; but, apart from the circumstance that that proposition is so self-evident that I hesitate to interpret the material as credibly evidencing an intention by Romania to dispute it, it appears to me that the Romanian argument on this branch of the case does not necessarily depend on who has the right to retain Mr. Mazilu as special rapporteur or to terminate his appointment on grounds of illness (governmental appointments being another matter). What Romania seems to be saying in its written statement to the Court, as I understand it, is something different which may be expressed this way:

(i) even assuming that Mr. Mazilu was and continues to be an expert on mission (as is found by the Court, with which I agree), illness so wholly incapacitated him from carrying out his functions as to preclude him from having any need for, and therefore any entitlement to, the privileges and immunities provided for by the Convention, these being functionally based; and

(ii) Romania has exclusive domestic jurisdiction over the health of its nationals, with the consequence that, Romania having made its own determination of Mr. Mazilu's state of health, that determination is

final for all purposes, and any attempt by the United Nations to verify it within Romania or to act contrary to it would be an interference in Romania's internal affairs (paras. 19 and 26 of the Advisory Opinion; Dossier, doc. No. 61, para. 53, and doc. No. 64, para. 42; Romania's written statement to the Court, pp. 7-8; United States written statement to the Court, p. 10; and the Secretary-General's written statement to the Court, paras. 17, 19 and 67).

If indeed this is the Romanian argument, it would not appear to be free from difficulty. Mr. Mazilu's status as a special rapporteur is based on a relationship subsisting exclusively as between himself and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. A decision as to whether a special rapporteur is in such a state of health as to be incapable of functioning is one to be made by the Sub-Commission as the employer. As a stranger in law to the relationship between the Sub-Commission and Mr. Mazilu, Romania had no juridical basis for intervening to impose its own opinion on the point. No doubt States ordinarily have exclusive domestic jurisdiction over questions concerning the health of their nationals and can and do intervene on such questions as between employer and employee. But the settled jurisprudence of the Court makes it clear that a matter which would normally be within a State's domestic jurisdiction ceases to be exclusively so to the extent to which it has come to be also governed by any international obligations undertaken by the State (see the *Nationality Decrees Issued in Tunis and Morocco* case, *P.C.I.J., Series B, No. 4*, pp. 21-24; the *Acquisition of Polish Nationality* case, *P.C.I.J., Series B, No. 7*, p. 16; the *Certain Norwegian Loans* case, *I.C.J. Reports 1957*, pp. 37-38, *per* Judge Lauterpacht; and the *Aegean Sea Continental Shelf* case, *I.C.J. Reports 1978*, pp. 24-25).

In my view, in agreeing to accord privileges and immunities to their nationals for the purpose of enabling them to carry out their functions when appointed as experts on missions, alternatively, by reason of their being parties to the Charter and committed to promoting its objectives, Member States by necessary implication conceded to the United Nations a right in good faith (not questioned in this case) to determine the capacity of such nationals, on grounds of ill health or otherwise, to continue to carry out their functions. If the Romanian position is correct, the United Nations would be wholly excluded from exercising that right once the view was expressed by the State of nationality that an expert was too ill to perform. It is not necessary, in my view, to consider what settlement procedures might be available if a dispute were to arise as to whether the United Nations was acting in good faith.

IV. Applicability of the General Convention to Enable an Expert to Leave His State of Nationality or Residence in Connection with His Mission

The circumstance that the Court's Advisory Opinion specifies some of the more important privileges and immunities available to experts on missions, and therefore to Mr. Mazilu as such an expert, does not perhaps mesh entirely with the view presented by the Secretary-General to the effect that "the Court ... has not been asked ... about what privileges and immunities Mr. Mazilu might enjoy as a result of his status ..." (Advisory Opinion, para. 27). If the Court has in fact acted on a less sparing conception of the scope of the request, this is because, as it appears to me, the view referred to is admissible not by way of modification of the scope of the request, but only by way of interpretation, as it was of course intended; and possible interpretations advanced before the Court do not restrict the range of choice open to it as to the meaning of the governing text of the resolution presenting the request (see the analogous approach taken in the *Factory at Chorzów* case, *P.C.I.J., Series A, No. 13*, pp. 15-16; the *Free Zones of Upper Savoy and the District of Gex* case, *P.C.I.J., Series A, No. 22*, p. 15, and *P.C.I.J., Series A/B, No. 46*, p. 138; the *South West Africa* case, *I.C.J. Reports 1966*, p. 354, *per* Judge Jessup, dissenting; and *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 223).

In settling what interpretation is to be placed on the question before the Court, it would seem best to approach the question "in the light of the actual framework of fact and law in which it falls for consideration" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 76). That framework may be gathered from the terms of the request viewed against the background material submitted by the Secretary-General in relation to the Sub-Commission's own resolution to which the request expressly refers (see the approach taken by Judge Lauterpacht in the *South West Africa* case, *I.C.J. Reports 1956*, p. 36). Interpreted this way, it is reasonably clear that the request is intended to invite an answer not only as to whether Article VI, Section 22, of the General Convention is applicable in principle "in the case of Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission", but also, if it is applicable, as to the way in which it is applicable in the particular circumstances of that particular case. When the context and structure of the request are considered, technical distinctions between the concepts of "applicability" and "application" do not have the effect of excluding these aspects, provided that the answer does not trench on any question as to whether any particular privilege or immunity was violated.

In my view, therefore, the Advisory Opinion has correctly gone on to identify particular privileges and immunities available to experts on

missions, and hence to Mr. Mazilu as such an expert. But there is one particular right, namely, that relating to travel, which, I believe, merits closer attention. This aspect is linked to paragraph 55 of the Advisory Opinion which states that rapporteurs or special rapporteurs

> "enjoy, in accordance with Section 22, the privileges and immunities necessary for the exercise of their functions, and in particular for the establishment of any contacts which may be useful for the preparation, the drafting and the presentation of their reports . . .".

I understand this as conveying, among other things, that experts on missions, whether or not assigned to any particular place, are entitled to invoke the privileges and immunities conferred by the Convention to enable them to leave their State of nationality or residence in connection with the performance of their missions. With this view I agree, but I should like to give my reasons for supporting it with a degree of specificity commensurate with the special, if not primary, interest which it manifestly has for the requesting organ, as may be gathered from the several references to it, on one aspect or another, in the Advisory Opinion itself (see paras. 11, 13, 14, 16, 17, 18, 21, 22, 24, 26, 49 and 52).

My reasons may be conveniently set out in relation to the Romanian contention by which the issue was presented. Treating Mr. Mazilu as an expert present in his own State but assigned to function elsewhere (a position which I will assume for the sake of analysis), Romania submitted that —

> "Section 22 of the Convention provides that 'experts . . . performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions'. Those provisions make it clearly apparent that an expert is not accorded such privileges and immunities anywhere and everywhere, but only in the country to which he is sent on mission and during the time spent on the mission, and also in the countries to which he must transit when travelling to meet the requirements of the mission. In the same way, the privileges and immunities only come into existence from the expert's time of departure, when he travels to accomplish the mission. In so far as the expert's journey to carry out the mission for the United Nations has not begun, for reasons entirely unconnected with his activity as an expert, there is no legal basis upon which to lay claim to privileges and immunities under the Convention, regardless of whether he is in his country of residence or in another country, in a capacity other than that of an expert.
>
> In the country of which he is a citizen, in the country where he has his permanent residence, or in other countries where he may be for reasons unconnected with the mission in question, the expert is only

accorded privileges and immunities in relation to the content of the activity in which he engages during his mission (including his spoken and written communications)." (Romania's written statement to the Court, p. 6. And see Advisory Opinion, para. 24.)

I accept as accurate Romania's statement "that an expert is not accorded such privileges and immunities anywhere and everywhere": their functional character clearly excludes so wholesale and undiscriminating an application. Where I have difficulty is in so far as it would seem to follow from Romania's position that an expert present in a Member State who, for reasons entirely unconnected with his activity as an expert, has not in fact begun his outward journey to carry out a mission falling to be discharged elsewhere but who wishes to embark on such a journey, cannot, as a matter of law, invoke those privileges and immunities to enable him to commence the journey. This is because, on Romania's argument, so long as he has not begun his journey, he is not entitled to any privileges and immunities apart from the limited and not relevant exception mentioned in its statement. So, the limited exception apart, not having begun the journey, the expert has no privileges and immunities, and, not having any privileges and immunities, he cannot enforce a right to begin the journey. Locked in within this system, the expert may well be unable to perform the mission which the privileges and immunities were intended to enable him to perform. Possibly, so strange a result could collide with the position taken by the Court as to the "duty [of a party to a treaty] not to deprive [it] of its object and purpose" (*Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, p. 140, para. 280; cf. *ibid.*, p. 249, para. 79, *per* Judge Oda, dissenting). I propose, however, to approach the matter in the following way.

In conferring privileges and immunities on experts "during . . . the time spent on journeys in connection with their missions", Article VI, Section 22, of the Convention obviously regards the making of such a journey as an essential step in the discharge of an expert's mission, as, indeed, it plainly is. Equally obviously, an expert may need to commence such a journey from any Member State in which he happens to be, even if he is there for a purpose wholly unconnected with his mission. Accordingly, his entitlement under that provision to "such privileges and immunities as are necessary for the independent exercise of [his] functions during the period of" his mission would extend to enable him to embark on such a journey undertaken in connection with the discharge of those functions. The express reference to "privileges and immunities . . . during . . . the time spent on journeys in connection with" his mission cannot be read as meaning that privileges and immunities are available only if and when such a journey is in fact in progress but not also for the purpose of enforcing a right to commence the journey in the first place.

Under Article VII, Section 26, of the General Convention (referred to in paragraph 43 of the Advisory Opinion) an expert is entitled to travelling facilities (including the issue of any necessary visas) from a Member State to which or through which he intends to go in connection with his mission. In exercise of this entitlement, the expert may have applied to such a State for visas and other facilities and secured them only to discover that he cannot use them if he cannot rely on the privileges and immunities conferred by Article VI, Section 22, of the Convention to enable him to leave a Member State in which he happens to be present for a purpose unconnected with his mission.

However strict may be the construction to be placed on provisions providing for privileges and immunities (see Alain Plantey, *Droit et pratique de la Fonction publique internationale*, Paris, 1977, p. 409, para. 1298), results as surprising as those indicated above suggest that the privileges and immunities conferred on an expert by Article VI, Section 22, of the Convention must, subject to the limitations prescribed in that Article, be construed as extending to afford protection against all acts which could frustrate their operation or empty them of real content, with the consequence of effectively preventing the expert from embarking on or resuming his mission. The dangers which proverbially lurk in the use of maxims do not seem to forbid recourse in this case to the well-known words *quando lex aliquid alicui concedit concedere videtur et id sine quo res ipsa esse non potest* — when the law gives a man anything, it gives him that also without which the thing itself cannot exist.

Explaining the rarity of references in the judgments of the Court to arbitral decisions, Judge Charles De Visscher wrote:

> "The rarity of such references is a matter of prudence; the Court is careful not to introduce into its decisions elements whose heterogeneous character might escape its vigilance" (Charles De Visscher, *Theory and Reality in Public International Law*, rev. ed., 1968, p. 391).

Judge Jessup's interesting explanation was: "The Court, *qua* Court, naturally hesitates to cite individuals or national courts lest it appear to have some bias or predilection" (Judge Philip C. Jessup, letter dated 16 August 1979, *Annuaire de l'Institut de droit international*, 1985, Vol. 61, I, p. 253). No doubt these words of caution extend to other decisions as well. But, apart from the fact that there is some flexibility in the case of individual judges, I do believe that the judicial policy concerning such citations, wise as it is, is not of such rigidity as in practice to disable the Court from benefiting from other experience, particularly where specific guidance in its own jurisprudence is lacking, as seems to be the case here.

Without suggesting that it is wholly applicable, I turn accordingly to the general approach taken in the majority opinion of the European Court

of Human Rights in the *Golder* case (Judgment of 21 February 1975, Series A, Vol. 18) in which that Court had to construe Article 6, paragraph 1, of the European Convention on Human Rights, reading:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . ."

Recognizing that this provision did not in terms confer a right of access to the courts, the European Court of Human Rights nevertheless affirmed the existence of such a right in these words:

> "While the right to a fair, public and expeditious judicial procedure can assuredly apply only to proceedings in being, it does not, however, necessarily follow that a right to the very institution of such proceedings is thereby excluded . . ." (*Ibid.*, p. 15, para. 32.)

In effect, if it was correct to say that Article 6, paragraph 1, of the European Convention excluded an antecedent right to institute proceedings in a court, it would follow that the right conferred by that provision to a fair, public and expeditious judicial procedure could prove to be largely devoid of substance. Likewise in this case, if it is correct to say that Article VI, Section 22, of the General Convention excludes an antecedent right to commence a journey from a Member State in connection with the performance of the expert's mission where the expert's presence in that State was for a purpose unconnected with the mission, it would follow that the right conferred on him by that provision to privileges and immunities "during . . . the time spent on journeys in connection with" such a mission (not to speak of other privileges and immunities) could turn out to be illusory, with the further result that the mission itself could remain undischarged.

While the situation in the *Golder* case differs in several respects from that here, at the level of principle it would seem to me that the reasoning in that case supports the conclusion that Article VI, Section 22, of the General Convention is applicable to enable an expert to leave any Member State for the purpose of carrying out his mission even if his presence in that State was for a purpose entirely unconnected with the mission.

(Signed) Mohamed SHAHABUDDEEN.